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MICHAEL RODAK, JR.

NO. 79-1404, 79-1408, 79-1415 and 79-1489

Supreme Court of the United States

OCTOBER TERM, 1980

PENNHURST STATE SCHOOL AND HOSPITAL, et al.,

Defendant-Appellants

v.

TERRI LEE HALDERMAN, et al.,

Plaintiff-Appellees

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF THE DEFENDANT-APPELLANTS

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QUESTIONS PRESENTED AND DISCUSSED BY AMICUS

1. Whether the Court below construed the Act in a manner which will require federal intervention into the states' determinations regarding the nature, structure, fiscal feasibility and location of services to the retarded, and therefore violates principles of federalism embodied in the Tenth Amendment of the United States Constitution?

2. Whether the Court below erred in concluding that the Act provides the developmentally disabled with a legal entitlement to treatment which must be rendered in the least restrictive alternative?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit appears at 612 F. 2d 84.

The opinion and order of the United States District Court for the Eastern District of Pennsylvania both appear at 446 F. Supp. 1295.

CONSENT OF THE PARTIES

Consent of the parties is not required since this brief of the State of Connecticut as Amicus Curiae is sponsored by its Attorney General U.S. Sup. Ct. R. 36.

INTEREST OF AMICUS CURIAE

The State of Connecticut renders necessary services to its retarded citizens. A wide variety of services are offered including evaluation and testing, counseling, respite care, day care, special school districts, supervised apartments, independent apartments, independent living programs, group homes, regional centers and state schools for the retarded.

In 1973 the Connecticut Department of Mental Retardation undertook an extensive evaluation of the services that were provided and of the Department's goals for the future. The resulting plan,[1] which was updated in 1979, committed the Department to moving in the direction of community based

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[1]The plan represents the views of the Connecticut Department of Mental Retardation and requires extensive funding from the State Legislature to be implemented.

services.[2] The Department, however, recognizes that a variety of residential treatment options must be maintained in order to meet varying individual needs and that an adequately staffed and competently managed state school for the retarded ramains the most appropriate placement for many of Connecticut's retarded citizens.[3] Although Connecticut has been responsible in meeting the needs of its citizenry, the Department lacks the resources to meet the needs of all of the retarded that are in need of residential treatment services. Accordingly, two hundred seventy-eight (278) retarded citizens were on the Department's "urgent waiting list" for residential treatment services as of August 1, 1980.[4]

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[2]The planning document states the Department's goal that:

> "DMR will assure that the residential needs of the mentally retarded citizens of Connecticut are met. The Department will follow the principle of normalization in meeting these residential needs. This means that each retarded citizen will live in an environment which: 1) reflects as nearly as possible 'normal' living situations of the larger society commensurate with his/her individual needs; 2) secures his/her health, safety, and welfare; 3) promotes the maximum development of his/her potential to make full use of that environment."
>
> Project Challenge, Residential Services Plan of the Connecticut Department of Mental Retardation (1979) p. 38.

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[3]The plan provides that:

> "(T)he Department's goal is stated in Project Challenge is to provide a variety of options that will effectively meet the *individual* needs of the mentally retarded. The very nature of mental retardation demands these options. As community attitudes change and the necessary support systems are developed, the young retarded person will, for the most part, be able to live in the community throughout his lifetime. For many individuals, because of their specific needs, relocation into the community is often very difficult and the campus programs of the training schools and regional centers will no doubt continue to be the most appropriate and humane place for them."
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> Project Challenge, *supra*, Introduction.

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[4]A relatively small number of retarded citizens are committed to the care of the Department pursuant to the Connecticut civil commitment statutes, Conn. Gen. Stat. §17-176, *et seq*. Typically, the Department responds to emotional pleas for help when a family in crisis can no longer cope with the demands of a retarded family member.

The court below broke new ground in federal-state relations concerning the care of the retarded in at least two respects:

1) By ruling that the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6000, et seq. (hereinafter the "DD Act" or the "Act"), requires the states to render services to all of its developmentally disabled citizens, and

2) By requiring the services to be rendered in the least restrictive environment.

If the decision of the court below is affirmed, or followed by the remaining Circuits, the states will be required to provide services, regardless of cost, to all its developmentally disabled citizenry and in the manner that is mandated by the federal judiciary.[5]

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[5]The Brief of the United States in Opposition to the Grant of Certiorari, at p. 14, asserts that the court:

> "... concluded that when the State accepts responsibility for the care of the mentally disabled and accepts federal funding under the Act to assist in performing that responsibility, it must provide that care in a manner consistent with the Act. The court did not consider, much less adjudicate, the quite different question whether the state must provide for the care of all its mentally disabled citizens."

The United States is correct only to the extent that the decree is necessarily limited to parties to the action. *Amicus* notes, however, that the definition of the plaintiff class, whose rights were adjudicated, included those "who may become residents of Pennhurst," 612 F.2d at 89, i.e., the plaintiff class includes by definition those who are not currently receiving services. Second, the Order of the District Court, which was not modified by the Court below, enjoined the state and county defendants to provide community living arrangements to those currently *on Pennhurst's waiting list* and appointed a special master who was required to formulate a plan to habilitate "*all plaintiffs* in the least separate, most integrated, least restrictive community setting ..." 446 F. Supp. at 1326, 1327. See generally, Paragraphs 1, 2, 3, 6(a)-(g) of the Order of the District Court, *id.*, wherein the District Court clearly indicates that its Order extends to all retarded citizens in the geographical area served by the Pennhurst State School. Third, the Act which the Court below construed ambiguously declares a finding of a "right of treatment" without limiting the right to those who are currently receiving services. Fourth, the section of the opinion of the Court below that found a "right to treatment" did so without any indication that the "right" was limited to those who are

If the decision below is affirmed, the most immediate impact on Connecticut will be to question the continued viability of Connecticut's "campus programs", which serve approximately three thousand Connecticut citizens.[6] As noted, *supra*, the Connecticut Department of Mental Retardation is committed to moving in the direction of community services, but maintains that campus programs will continue to be necessary for a significant number of Connecticut's citizens. If the Act requires community based services as the "least restrictive alternatives" not only will Connecticut's judgment as to the most appropriate care for its severely retarded multiply-handicapped citizens be supplainted by federal policies, but Connecticut will be required to expend significant sums to provide the required community based facilities. The cost of non-institutional housing is difficult to estimate because it is rapidly escalating and because it varies from region to region. The Department's most recent calculations, however, indicate that new construction costs an average of $37,322.42 per client bed, while purchased renovated group homes cost an average of $26,339.29 per client bed. Given the rapidly rising costs of construction, the initial capital costs of moving a significant number of the three thousand (3,000) Connecticut citizens in the campus programs to community living arrangements would be well in excess of ninety million dollars ($90,000,000.00). In addition, significant increases in annual operating costs will accrue due to the necessity of providing increased direct care staff and medical and psychological support services over a geographically diverse area.

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currently receiving services. See 612 F.2d at 95-100. Finally, the remedy ordered by the Courts below requires that there be a "right to treatment" since if the Act is limited to instances ". . . when the state accepts responsibility for the care of the mentally disabled . . .," the Courts would have been limited to enjoining the continued operation of the facility rather than mandating alternative community living arrangements.

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[6]Connecticut maintains two state schools for the retarded, the Mansfield Training School and the Southbury Training School, which serve 986 and 1326 retarded citizens respectively. In addition, 644 retarded citizens reside in campus programs at eight different regional centers.

Connecticut, like all of the fifty states, participates in the DD Act program, receiving federal funds under the Act to render services in accordance with its state plan, which has been approved by the Department of Health, Education and Welfare (HEW). Only approximately three hundred ninety-eight thousand ($398,000) dollars in federal monies was received under the Act for the fiscal year ended September 30, 1979. All of the monies received under the Act are utilized to provide community based services.[7]

Finally, Connecticut is "interested" in this action since there are several lawsuits pending in the U.S. District Court for the District of Connecticut which involve claims by developmentally disabled citizens that their rights under the Act are not being met. Most notably, *Connecticut Association for Retarded Citizens vs. Mansfield Training School*, No. H-78-653 (D. Conn. filed December 6, 1978), is a class action lawsuit, closely patterned after *Halderman vs. Pennhurst*, wherein the plaintiffs seek to close a state school for the retarded and to require that the State provide alternative community living arrangements for its residents.[8]

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[7]The District Court in *Halderman* made no findings as to the DD Act. The Supplemental Memorandum of the Commonwealth of Pennsylvania before the Third Circuit Court of Appeals, dated August 15, 1979, p. 1-7, however, indicates that no DD Act funds are utilized at Pennhurst.

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[8]The facility that is the subject of the action, the Mansfield Training School, has reduced its population from approximately two thousand (2,000) ten years ago to nine hundred eighty-six (986) today. The Department plans to continue reducing its population until it serves four hundred eighty (480) residents, Project Challenge, *supra*, p. 39, and to convert the facility into an entirely ICF/MR facility, i.e. all of the living units will meet federal standards for reimbursement under the Title XIX medicaid program.

STATEMENT OF THE CASE

This is a class action lawsuit, brought on behalf of all current and future residents of the Pennhurst State School and Hospital, alleging that the facility is operated in a manner that violates its mentally retarded residents' constitutional and statutory rights.

After an extensive trial, the District Court (Broderick, J.) found that the facility violated its residents' constitutional rights to "habilitation", *Halderman v. Pennhurst State School and Hospital*, 446 F. Supp. 1295, 1314, 1321 (E.D. Pa. 1977), as well as their statutory right to "nondiscriminatory habilitation" under Section 504 of the Rehabilitation Act, 29 U.S.C. §794. *id.* at 1323. Rather than ordering that the facility be improved, the District Court ordered that the facility be closed and a master was appointed to supervise the transfer of residents into the community. *id.* at 1325.

On appeal, the Third Circuit Court of Appeals largely affirmed the relief ordered below, but relied on an entirely different legal approach than the District Court. *Halderman v. Pennhurst State School and Hospital*, 612 F. 2d 84 (3rd Cir. 1979). The majority ruled that Congress was legislating to implement the Fourteenth Amendment when it passed the DD Act, *id.* at 98, and that the Act provided the developmentally disabled with a right to habilitation, *id.* at 95, which must be provided in the setting that is least restrictive to personal liberty. *id.* at 107.

SUMMARY OF ARGUMENT

Contrary to the opinion of the Court below, the Act was not passed to implement the Fourteenth Amendment since: 1) the legislative history of the Act indicates that it is a co-operative grant program; 2) the Act, as construed by the Court, below, is not "appropriate" legislation to implement the Fourteenth Amendment in that it goes well beyond the judicially declared limits of the Fourteenth Amendment; and 3) the Act is inconsistent with those lower court decisions that have found a *quid pro quo* right to treatment under the Fourteenth Amendment. Since the Act was not passed to implement the Fourteenth Amendment, it is not necessary to consider whether legislation implementing the Fourteenth Amendment overrides the Tenth Amendment.

The Act, as construed by the Court below, impermissibly interferes with traditional state functions in violation of the Tenth Amendment, in that it dictates who is to receive services from the state (all of the developmentally disabled) and the manner by which the services are to be rendered (the least restrictive alternative).

The difficult constitutional issues raised by the opinion of the Court below are a result of an erroneous construction of the Act which is, in fact, a co-operative grant program with specified obligations placed upon the states. The Court below erroneously concluded that a Congressional "finding" of the rights of the disabled created an obligation upon the states, which holding is inconsistent with the Act, its legislative history and the implementing regulations.

ARGUMENT

I. The Decision of the Court Below Construes the Act in a Manner Which Will Require Federal Intervention into the States' Determinations Regarding the Nature, Structure, Fis-

cal Feasibility and Location of Services to the Retarded, and Therefore Violates Principles of Federalism Embodied in the Tenth Amendment of the United States Constitution.

A.

The Act was not passed pursuant to Congress' power to implement the Fourteenth Amendment.

1. As noted, *supra*, the Court below held that the DD Act was passed pursuant to Congress' power to implement the Fourteenth Amendment.

The only support that the Court below offered for their conclusion that Congress intended to legislate pursuant to the Fourteenth Amendment is the remarks of two Senators, neither Chairman of the Subcommittee that introduced the legislation, as to Senate Bill 462. 612 F. 2d n. 17 at 98. The Bill subsequently went to conference where the "rights" provided by Senate Bill 462 were compromised. See, H.R. Conf. Rep. 94-473, 94th Cong., 1st Sess. p. 41, 42, *reprinted in* 2 (1975) U.S. Code Cong. and Ad. News 943, 961, 962.

Even the remarks of the two individual Senators do not support a finding that the DD Act was enacted pursuant to Congress' power to implement the Fourteenth Amendment. Senator Stafford's remark is that, "Title II was added to the bill to assist in the protection of rights guaranteed under our Constitution . . ." 121 Cong. Rec. 16516 (1975). Senator Javits remarked that the federal government had abrogated its responsibility toward the developmentally disabled, citing *Wyatt v. Stickney*, and then noted that, "Congress should reaffirm its belief in equal rights for all citizens . . . This bill of rights of S.B. 462 represents this new direction, and begins this new reaffirmation." 121 Cong. Rec. 16519 (1975). "Assistance" or a "new reaffirmation" may indicate Congressional concern and a preference for deinstitutionalization, but hardly amounts to a

federal mandate passed pursuant to the Fourteenth Amendment.

That conclusion is also inconsistent with the history of the Act, see H.R. Conf. Rep. 94-473 *supra*, and the implementing HEW regulations which indicate that Act is a co-operative federal-state grant program.

2. The Court below asserted that "Section 6010 does not go beyond what has been judicially declared to be the limits of the Fourteenth Amendment but clearly is within those bounds." 612 F. 2d at 98.

Congress clearly has the power to secure the guarantees of the Fourteenth Amendment by "appropriate legislation." *Katzenbach vs. Morgan*, 384 U.S. 641, 651 (1966). The Court below, however, failed to adequately examine whether the DD Act is appropriate legislation to secure Fourteenth Amendment guarantees.

The Fourteenth Amendment has consistently been construed as a limitation on state power to impair protected liberty or property interests, absent due process of law. Although a relatively few protected interests have been found to stem directly from the Constitution itself, this Court has repeatedly held that protected interests generally stem from independent sources, such as state law. *Board of Regents vs. Roth*, 408 U.S. 564 (1972); *Perry vs. Sinderman*, 408 U.S. 593 (1972); *Bishop vs. Wood*, 426 U.S. 341 (1976); *Paul vs. Davis*, 424 U.S. 693 (1976).

Accordingly, there is no more basis for asserting a constitutional "right to treatment" as there is to asserting a constitutional entitlement to such other governmental services as welfare, *Dandridge vs. Williams*, 397 U.S. 471 (1970), *Lavine vs. Milne*, 424 U.S. 577, 584 n. 9 (1976); education, *San Antonio Independent School District vs. Rodriguez*, 411 U.S. 1

(1973); housing *Lindsey vs. Normet*, 405 U.S. 56 (1972); or employment, *Perry vs. Sinderman, supra*, p. 597.[9]

3. Those Courts that have found a "right to treatment" have recognized that the "right" does not rise independently from the Constitution, but have found that it is due as a quid pro quo for civil commitment.[10] See for example *Wyatt v. Stickney*, 325 F. Supp. 781. *enforced*. 334 F. Supp. 1341 (1971), *supplemented*, 344 F. Supp. F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, rev'd in part, remanded in part, sub nom. Wyatt v. Alderholt*, 503 F. 2d 1305 (5th Cir. 1974); *Donaldson v. O'Connor*, 493 F. 2d 507 (5th Cir. 1974), *vacated on other grounds and remanded*, 422 U.S. 563 (1975); *Gary W. v. Louisiana*, 437 F. Supp. 1209 (E.D. La. 1976).

This Court has not yet ruled on whether civilly committed patients have a right to treatment. In *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975), this Court narrowly ruled that, " . . . a State cannot constitutionally confine without more a non-dangerous individual who is capable of surviving safely in

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[9]The Court below cited *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) for the proposition that ". . . among the liberties protected by the fourteenth amendment is 'a right to be free from and to obtain judicial relief, for unjustified intrusions on personal security.' " 612 F.2d at 98. *Ingraham v. Wright*, read together with *Donaldson v. O'Connor*, 422 U.S. 563 (1975), however, only requires that there be a justification for the confinement (i.e. for the commitment). They cannot be read as establishing a constitutional entitlement to treatment for all of the developmentally disabled (whether committed, voluntarily receiving services or not receiving services) which treatment must be rendered in the least restrictive alternative.

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[10]Cases concerning the retarded have tended to blur the distinction between the civil commitment of retardates and the voluntary rendition of necessary services at the request of the retardate, parent or legal guardian, and have assumed that any retardate in a state institution is there involuntarily. See *Halderman v. Pennhurst*, 446 F.Supp. 1295, 1319 (1977); *Wyatt v. Stickney*, 344 F. Supp. 387, 390, n. 5 (1972).That approach universally puts the burden of retarded citizens condition upon the states should the states voluntarily render services and is a questionable application of state action principles. See, *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149 (1978).

freedom . . .". The right to treatment theory, however has been sharply criticized. Speece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 Ariz. L. Rev. 1 (1978); *Connor v. Donaldson, supra*, p. 295-2500. (Burger, J.) (concurring opinion.)

Whatever its merits, the Court below turned the "right to treatment" theory on its head by holding that the DD Act, passed pursuant to Congress' power to implement the Fourteenth Amendment, obligates the states to treat all of its developmentally disabled residents and to do so in a manner that is least restrictive to personal liberties. That construction is inconsistent with the right to treatment theory, which only requires treatment as the *quid pro quo* for a deprivation of liberty.

Wherefore, the Court below erred since the Act, as construed by the Court below, is not "appropriate" legislation implementing the Fourteenth Amendment, *Katzenback vs. Morgan, supra*, because instead of limiting the states from interfering with protected rights, it affirmatively obligates the states to render services to their citizens in the manner prescribed by Congress whether or not the states desire to render such services or are fiscally able to provide such services.

B.

The Act, as Construed by the Court Below, Impermissibly Interferes with Traditional State Functions in Violation of the Principles of Federalism Embodied in the Tenth Amendment of the United States Constitution.

The Court below recognized that a Tenth Amendment issue would be presented if a private cause of action was implied from a grant program. 612 F. 2d at 98, 99. The issue was avoided by its holdings that the DD Act was passed pursuant to

Congress' power to implement the Fourteenth Amendment and that legislation implementing the Fourteenth Amendment overrides Tenth Amendment concerns.[11]

In light of the discussion, *supra*, showing that the Act clearly was not passed pursuant to the Fourteenth Amendment, it is necessary to consider whether the Act, as construed by the Third Circuit, violates the Tenth Amendment to the United States Constitution.

National League of Cities vs. Usery, 426 U.S. 833, 851 (1976), held that the Tenth Amendment bars the federal government from impermissibly interfering with traditional governmental functions of the States. *National League of Cities* concerned the validity of 1974 Congressional legislation under the commerce clause which extended minimum wage and maximum hour provisions of the Fair Labor Standards Act to the states. The Court noted that "(i)f Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these (traditional state) functions must rest, we think there would be little left of the States' separate and independent

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[11]Several lower courts have held that legislation implementing the Fourteenth Amendment overrides Tenth Amendment concerns. The reported cases involve legislation unlike the DD Act in that the statutes were clearly "appropriate" to implement the Fourteenth Amendment since the legislation barred the states from treating similarly situated citizens differently. See for example, *Arritt v. Grisell, 567 F.2d 1267* (4th Cir. 1977) (Age Discrimination in Employment Act, 29 U.S.C. §623, implements the Fourteenth Amendment and supersedes the Tenth Amendment); *Marshall v. Owensboro-Daviess County Hospital*, 581 F.2d 116 (6th Cir. 1978) and *Usery v. Charlestown County School District*, 558 F.2d 1169 (4th Cir. 1977) (Equal Pay Act, 29 U.S.C. §206(d)(1), implements the Fourteenth Amendment and supercedes the Tenth Amendment).

The lower court cases, upon examination, stand for the proposition that appropriate legislation will overcome Tenth Amendment concerns when,on balance, the federal interest outweighs the impact on the states. Assuming *arguendo* that the DD Act is "appropriate", its impact must still be examined on the retained right of the states to structure the nature and scope of service provided.

existence;" 426 U.S. at 851 citing to *Coyle v. Oklahoma*, 221 U.S. 559 (1911), and held that "insofar as the challenged amendments operate to displace the States' *freedom to structure integral operations in areas of traditional governmental functions*, they are not within the authority granted Congress by Art. I, §8, cl. 3" 426 U.S. at 852 (emphasis added).

Subsequent lower Court decisions have held other activities to be within the protected sphere of state sovereignty. *United States v. Best*, 573 F. 2d 1095, 1102 (9th Cir. 1978) (licensing of drivers is a traditional state function); *N.L.R.B. v. Highview, Inc.*, 590 F. 2d 174, 178 (5th Cir. 1979) (the care of the aged, sick and the indigent is a traditional state function); *Jordan v. Mills*, 473 F. Supp. 12 (E.D. Mich 1979) (operation of prisons is a traditional state function).

Clearly, care of the retarded has traditionally been reserved to the states in their role as *parens patriae*. *Parham v. J.R.*, U.S. , 99 S. Ct. 2493 (1979); *Addington v. Texas*, U.S. , 99 S. Ct. 1804 (1979); *McIntosh v. Dill*, 86 Okl. 1 (1922); *Johnson v. State*, 18 N.J. 422 (1955).

Just as clearly the Act, as construed by the Court below, interferes to an unprecedented degree with the states' retained right to structure the services that they provide by dictating who is to receive the services (all of the developmentally disabled) and the manner by which the services are to be rendered (in the least restrictive manner, as ultimately determined by the federal judiciary.[12]

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[12]If the DD Act is a co-operative grant program, as this *amicus* maintains, there is no qustion about the power of Congress to attach *reasonable* conditions to the receipt of federal funding. *King v. Smith*, 392 U.S. 309 (1968). There are two implications, common to all grant programs, however: 1) the states may withdraw or decline to participate if they so choose; and 2) the states, that participate, may only be required to provide those services that are mandatory on the states, as opposed to services that are appropriate and reimbursable under the Act, but left to the discretion of the states as to

If the Court below correctly construed the Act, and the validity of the Act is upheld by this Court on review, the role of the states has been reduced to administering (*and funding*) programs to comply with federally created obligations.[13] Although it is difficult to estimate the cost of complying with the Act, as construed by the Court below, it seems certain that the intial capital costs and the ongoing direct care, medical and programming costs will be monumental, especially when compared to the costs on the states of the minimum wage legislation struck down in *National League of Cities*.

Finally, the federal interest is ambiguous, but clearly insubstantial, when balanced against the extensive interference with traditional state functions. First, only a small proportion, approximately one percent, of all funds available for the care of the developmentally disabled are provided under the Act, H.R. Rep. No. 94-58, 94th Cong. 1st Sess., p. 6, (1975), *reprinted in* 2 (1975) U.S. Code Cong. and Ad. News 919, 924. Given the limited funding available under the Act; the purpose of the program is to promote ". . . effective planning by the states of their programs, initiation of new needed programs, and filling the gaps among existing efforts." *Id.* Second, the Act, as construed by the Court below, would conflict with the federal

whether or not they will be provided. *Quern v. Mandley*, 436 U.S. 725 (1978); *Beal v. Doe*, 432 U.S. 438 (1977); *Roe v. Norton*, 552 F.2d 928 (2nd. Cir), *on demand*, 408 F. Supp. 660 (D. Conn. 1975) (3-judge Court) *rev'd. sub nom Maher v. Roe*, 432 U.S. 464 (1977).

According to the Court below, however, the Act is not a grant program but is, instead, a mandate implementing the Fourteenth Amendment. The states, therefore, could not avoid the dictates of the Act by withdrawing from the program. 612 F.2d at 98, 99.

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[13]Even the administration of developmental disability programs will be subject to constant federal judicial scrutiny in that the judgment of the responsible state officials as to the "least restrictive alternative" may be challenged by the disabled citizen. Indeed, the Order of the Court below appointed a special master to make the individual determinations of the least restrictive alternative and to supervise the transfer of resident to the community. 612 F.2d at 114.

program which has the largest impact on the states delivery of services to the retarded in that large state schools for the retarded (or units within the institutions) have commonly met federal standards for reimbursement under the Title XIX medicaid program. Third, the legislative history of the Act is devoid of any indication, which would have been present, of any indication that Congress intended to impose massive new duties on the states without providing the funding to meet the newly created federal obligations (discussed *infra*). Fourth, although there has been a *recent* trend towards community services, the superiority of community services over more traditional approaches has not been established within the profession. Bella, *Relationship of Institution Size to Quality of Care: A Review of the Literature*, 81 Amer. J. of Mental Deficiency 117 (1976). Indeed, it is the opinion of the professionals in the Connecticut Department of Mental Retardation that an institution (adequately staffed and competently managed) remains the most appropriate placement for many of Connecticut's severely retarded and multiply handicapped citizen (discussed *supra*).

Wherefore, the Act, as construed by the Court below, impermissibly interferes with traditional state functions in violation of the Tenth Amendment to the United States Constitution.

II. The Act Does Not Provide the Developmentally Disabled With a Legal Entitlement to Treatment Which Must Be Rendered in the Least Restrictive Environment.

A.

The Act does not provide the developmentally disabled with a legal entitlement to treatment.

The difficult constitutional issues, discussed *supra*, are presented due to the construction of the Act by the Court

below, holding that the Act entitles every developmentally disabled person to treatment which must be provided in the least restrictive manner. While the Bill of Rights section, 42 U.S.C. §6010, is ambiguous, the construction by the Court below is inconsistent with the history of the Act, the legislative history of the 1975 Amendments and implementing HEW regulations.

Federal involvement in the area commenced with the Mental Retardation Facilities and Mental Health Centers Construction Act of 1963, P.L. 88-164, 77 Stat. 282 (1963), which provided grants to the states for construction of mental retardation facilities. House Rep. No. 94-58, *supra*, p. 2, 4, *reprinted in* 2 (1975) U.S. Code Cong. and Ad. News 919, 920, 922. The Act was substantially amended and renamed by the Developmental Disabilities Services and Facilities Construction Amendments, P.L. 91-517, 84 Stat. 1316 (1970), which broadened the scope of the Act from the retarded to the developmentally disabled generally and which authorized formula grants to the states for planning, administration and services in addition to the previously authorized grants for construction. House Rep. No. 94-58, *supra*, p. 4, *reprinted in* 2 (1975) U.S. Code Cong. and Ad. News 919, 922. The act was subsequently amended and renamed the Developmentally Disabled Assistance and Bill of Rights Act, P.L. 94-103, 89 Stat. 486 (1975) and further refined by the Developmental Disabilities Act Amendments of 1978, P.L. 95-602.

The Act provides grants to states electing to participate in the program. 42 U.S.C. §6063. Only a small percentage, approximately one percent, of all funds available from federal, state and local sources for services to the developmentally disabled are provided under the Act. House Rep. No. 94-58, *supra*, p. 6, *reprinted in* 2 (1975) U.S. Code Cong. and Ad. News 919, 924; H.R. Rep. No. 95-1188, 95th Cong. 2nd Sess., p. 51 (1978), *reprinted in* 6 (1978) U.S. Code Cong. and Ad. News 7355, 7359.

A state seeking funds under the Act must have a plan approved by the Secretary of Health, Education and Welfare, 42 U.S.C. §6063(b). The conditions of compliance are general with the participating states given broad administrative discretion within priorities established by Congress. 42 U.S.C. §6063 (b)(4)(B)(1979 Sup.).

Given the limited funding available under the Act, the purpose of the program is to promote "... effective planning by the states of their programs, initiation of new needed programs, and filling of gaps among existing efforts." House Rep. No. 94-58, *supra*, p. 6 *reprinted in* 2 (1975) U.S. Code Cong. and Ad. News 919, 924. Accordingly, those conditions of participation relating to the rendition of services apply only to programs receiving funds under the Act. For example, "services furnished . . . *under the plan*" and facilities in which they are provided must meet regulatory standards prscribed by HEW. 42 U.S.C. §6063(b)(5)(A)(i), and buildings "*used in conjunction* with the delivery of services *assisted under the plan*" must meet the requirements of the Architectural Barriers Act of 1968. 42 U.S.C. §6063(b)(5)(A)(ii). (Emphasis added).

The Developmentally Disabled Assistance and Bill of Rights Act of 1975 added for the first time the requirements of comprehensive evaluation systems, P.L. 94-103, Title II, 201, 42 U.S.C. §6009, 89 Stat. 502, and of individual habilitation plans, P.L. 94-103, Title II, §202, 89 Stat. 503, 42 U.S.C. §6011, and made "Congressional findings" respecting the rights of the developmentally disabled. P.L. 94-103, Title II, §201, 89 Stat. 502, 42 U.S.C. §6010.

In each case, the Senate Bill contained provisions placing onerous duties on the states which the joint conference refused to adopt.[14] Specifically, the Senate Bill, S. 462, contained a

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[14]See also S. 3378, 93rd Cong., 2nd Sess. (1974), and its Senate Report, Sen. 93-1169, 93rd Cong., 2nd Sess. (1974), *reprinted in* 13057-8 Sen. Miscellaneous Rep., Cal. No. 1117. The provisions of S. 462 were substantially identical to S. 3378 which passed the Senate one year previously, but died when the House failed to take it up.

requirement for an evaluation system for all services rendered to the developmentally disabled, but the conference compromise only requires a system ". . . for the evaluation of services provided to persons with developmental disabilities through programs assisted under the Act." H.R. Conf. Rep. No. 94-473, *supra*, p. 37, *reprinted in* 2 (1975) U.S. Code Cong. and Ad. News 943, 957; 42 U.S.C. §6009. And S. 462 provided that individual habilitation plans be maintained for every individual receiving services from all programs that receive any form of federal assistance, but the conference only agreed to require that a habilitation plan be required when funds under the DD Act ". . . contribute(s) a portion of the cost, of the habilitation services to the developmentally disabled person." H.R. Conf. Rep. No. 94-473, *supra*, p. 43, *reprinted in* 2 (1975) U.S. Code Cong. and Ad. News 943, 963; 42 U.S.C. §6011.

> "If, for example, the only Federal assistance received by a program is used solely to purchase a bus to transport developmentally disabled persons, then a written habilitation plan would not be required. If, on the other hand, a program to provide habilitation services to developmentally disabled individuals is supported in whole or in part by Federal funds under this Act, a written habilitation plan would be required for each program participant."
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> H.R. Conf. Rep. No. 94-473, *supra*, p. 43, reprinted in 2 (1975) U.S. Code Cong. and Ad. News 943, 963.

Finally the Senate Bill, but not the House Bill, contained detailed standards for the operation of all programs serving the developmentally disabled. The conference refused to adopt the standards and, as a compromise, made "Congressional findings" of a "right to treatment" which "should be" in the least

restrictive environment.[15] H.R. Conf. Rep. No. 94-473, *supra*, p. 41, 42, *reprinted in* 2 (1975) U.S. Code Cong. and Ad. News 961: 42 U.S.C. §6010 (1)(2).

Although Congress made a "finding" of a "right to treatment", Congress nowhere obligates the states to render treatment to its disabled citizens. It has merely been assumed that the states have an obligation to fulfill the "right to treatment," presumably because the states traditionally have provided such services in their role as *parens patriae*. It just as easily follows, however, that any right provided by 42 U.S.C. §6010(1) or (2) is enforceable against the federal governement in this "co-operative" program of providing services to the handicapped.

Furthermore the Act explicitly limits the obligations of the states under the Act. For example, Congress did provide that when a state provides residential services, the services must meet specified minimal requirements which are roughly analagous to conditions that raise Eight Amendment issues of cruel and unusual punishment. 42 U.S.C. §6010(3). And most significantly, Congress explicitly limited the obligations of the states to protecting the human rights of those retarded citizens who receive services funded by the DD Act.

> "(C) The plan must contain . . . assurances . . . that the *human rights* of all persons with developmental disabilities . . who are receiving treatment, services or habilitation *under programs assisted under this chapter will be protected consistent with section 6010* of this title (relating to the rights of the developmentally disabled)."
>
> 42 U.S.C. §6063(b)(5)(C). (emphasis added)

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[15]The precatory language "should be" is inconsistent with the finding of the Court below of a mandatory duty to render services in the least restrictive manner, discussed *infra*.

In accord, the agency charged with enforcement of the Act (HEW) has issued regulations requiring only that the states ensure that those who receive services funded by the Act be provided with their human rights and be treated in accordance with individual habilitation plans. 45 C.F.R. §1386.1 (b)(5)(vi); 45 C.F.R. §1386.1 (b)(5)(x).[16]

Wherefore, the Court below erred by equating the states' obligations under the Act with Congressional "findings" of a "right to treatment" and in not recognizing that the declaration of Congressional findings is a statement of what Congress finds to be desirable, but is not a grant of a legal entitlement *vis a vis* the states.

B.

The Act does not obligate the states to render services in the least restrictive manner.

As noted, *supra*, the Court below held that the developmentally disabled have a "right to treatment" which is to be provided in the "least restrictive" manner. The source of the "right" to be treated in the least restrictive manner is 42 U.S.C. §6010(2) which provides that:

> "The treatment, services, and habilitation for a person with developmental disabilities *should be* designed to maximize the developmental potential of the person and *should be* provided in the setting that is least restrictive of the person's personal liberty." (emphasis added)

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[16]Curiously, the Court below never mentions the limitations of 42 U.S.C. §6063(b)(5) and 45 C.F.R. §1386.1(b)(vi). Indeed at 612 F.2d 96, the Court notes that, "(m)ore over, the revised statute contains a section requiring states to conform their plans to the dictates of the Bill of rights provision. Section 6010," but fails to note that the requirement is limited to assistance furnished under the Act.

The language of the statute uses the precatory language, "should be," in describing the desired treatment setting. Such language is inconsistent with the Court's finding of a mandatory duty to provide services in a prescribed manner.

The legislative history to the 1975 Amendments is in accord with the Conference Report again using the precatory language "should be" in describing the desired treatment setting. H.R. Conf. Rep. No,. 94-473, *supra*, p. 42, *reprinted in* 2 (1975) U.S. Code Cong. and Ad. News 943, 961.

The 1975 amendments did encourage deinstitutionalization by requiring that specified percentages of the States' allotments be spent on eliminating *inappropriate* placement in institutions. P.L. 94-103, *formerly codified at* 42 U.S.C. §6062(a)(4). Again the legislative history of the Act clearly indicates that the funding requirement was only intended to encourage a trend toward community based treatment.

> ". . . the Committee has chosen to include a specific requirement that state programs plan for as much deinstitutionalization as is feasible, and earmark monies for this purpose . . . It is anticipated that these requirements will prompt *some movement* of patients from State institutions back into their communities." H.R. Rep. No. 94-58, *supra*, p. 10, *reprinted in* 2 (1975) U.S. Code Cong. and Ad. News 919, 928. (emphasis added)

Significantly, the requirement that the states earmark funds for deinstitutionalization was deleted by the 1978 amendments which now require that states devote sixty-five percent of the funds received under the Act to any one of four specified priority areas of service, one of which is community based services, 42 U.S.C. §6063(b)(4)(A) (1979 Supp.), P.L. 95-602, 92 Stat. 3010. See generally H.R. Rep. No. 95-1188, *supra*, p. 2, 10, *reprinted in* 6 (1978) U.S. Code Cong. and Ad. News 7355, 7356, 7364.

The Court below reached its conclusion by recognizing a Congressional *preference* for deinstitutionalization; that "until 1978" state plans were required to contain a plan for the elimination of inappropriate placements in institutions and to "support the establishment of community programs as alternatives". 612 F. 2d at 104. The Court further cites the remarks of Congressmen Carter and Biaggi which indicate a preference for deinstitutionalization. From these expressions of *preferences* for deinstitutionalization, the Third Circuit found a right to treatment in the least restrictive manner. 612 F. 2d at 104, 105.

It should be noted that the Third Circuit, in finding a preference for deinstitutionalization, relied in large part on statutory provisions that had been repealed by the 1978 amendments, effective one and one-half years before its recent decision. As discussed, *supra*, the states must now devote the majority of its effort under the Act in any one of four areas of priority, one of which is community services. 42 U.S.C. §6063(b)(4)(B)(i). (1979 Supp.)

Well established rules of construction have developed concerning co-operative federal grant programs wherein Courts have consistently refused to require states to provide all services that are authorized or appropriate, but, instead, have recognized the states' rights to tailor their plans according to fiscal requirements and local preferences as long as the state plans met those requirements mandated by federal law. *Beal v. Doe, supra; Queen v. Mandley, supra; Roe v. Norton, supra.*

As pointed out by the dissenting opinion, the Court below elevated a preference for least restrictive treatment into a mandatory duty, without statutory authority to do so.

> "The duty of the states under the Act is to provide alternative individual habilitation to the extent feasible, which includes a wide variety of fiscal concerns. Yet the impact of the approach taken by the majority

> is exactly the opposite: it imposes a duty to provide less restrictive treatment regardless of cost or available funds . . . It is improper to say an implied cause of action exists and then impose new substantive duties nowhere present in the statute in question."
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> *Halderman v. Pennhurst*, 612 F. 2d at 119 (dissenting opinion).

Significantly, in the only decision, subsequent to the one of the Court below, of which this *amicus* is aware, the Court refused to adopt the reasoning of the Court below but held that ". . . there is no section in the DDA which mandates deinstitutionalization, *per se*," and that "Congress still left it to the states to decide the proper allocation of funds and did not authorize federal courts to dictate how those funds were to be spent by the states." *Kentucky Ass'n for Retarded Citizens v. Conn., No. C78-0157 (A) (N.D. Ken. March 21, 1980) slip op.* p. 20. *Kentucky Ass'n for Retarded Citizens* reasoned that:

> "When paragraphs (1), (2) and (3) of 42 U.S.C. Sec. 6010 are fully examined, it seems fair to state that Congress contemplated that institutional as well as residential programs for the handicapped would continue to be provided, and, further, that the programs which are provided must either provide appropriate treatment and habilitation or meet the six standards referred to in paragraphs (3)(B)(i) through (vi).
>
> Read in this manner, it is far from apparent that Congress was mandating the discontinuance of institutional programs. On the contrary, it would seem that Congress realized that there might even be situations where a developmentally disabled person would not have to be furnished treatment and habilitation as such, but would have to be provided with custodial care according to minimum standards such

as proper diet, appropriate medical services, proper safety compliance, and prohibition of the use of physical restraint."

Kentucky Ass'n for Retarded Citizens v. Conn., *supra*, p. 19, 20.

Finally, the minimal federal finding belies federal intent to require that the states always provide treatment in the least restrictive alternative in this "co-operative" federal grant program. See *Quern v. Madley*, *supra*, p. 745, 746.

CONCLUSION

The decision of the Court below should be reversed.

Respectfully submitted,

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